FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

SENSITIVE

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
	)	
Democratic National Committee,	)	
Democratic State Parties Organization,	)	**MUR 5338**
The Leadership Forum, and	)	
National Republican Congressional Committee	)	
	)	

Additional Statement of Commissioner David M. Mason

I supported the recommendations of the General Counsel in this matter and concur in and rely upon the analysis in the First General Counsel's Report (FGCR) for my conclusions. I concur with the Statement of Reasons issued by Vice Chairman Smith, including his jurisdictional arguments which are essentially the same arguments I made in my Statement of Reasons in MUR 4766, Philip Morris, et al. I write to provide some additional views on matters raised in the FGCR for MUR 5338 and during the Commission's consideration of it.

Leadership Forum

I agree with the conclusion of the General Counsel that the Leadership Forum is not established, financed, maintained or controlled by the NRCC. However, the FGCR indicates that its analysis "turns on the application of" 11 CFR 300.2(c)(3) which provides that the Commission will not apply the BCRA prohibition on the use of non-Federal funds by entities established, financed, maintained or controlled by national party committees in an *ex post facto* manner. I agree with the analysis of the FGCR and its application of our regulations to the facts as they exist but fear that the identification of the "safe harbor" rules at 11 CFR 300.2(c)(3) as determinative could be misconstrued and may be overemphasized in the FCGR.

First, the FGCR fails to note that the principal effect of 11 CFR 300.2(c)(3) as to this transaction is subject the NRCC donation from its building fund to the Leadership Forum to analysis at all. While the regulation provides that the Commission's examination of whether an organization is established, financed, maintained or controlled by the national party committee will be based on actions and activities solely after the effective date of the BCRA soft money restrictions, the regulation also provides that funds received from a national party committee prior to November 6, 2002 but still on hand after that date may be considered in this analysis. Absent this "safe harbor" provision the relevant provision at 11 CFR 300.2(c)(2)(vii) is whether

a national party committee "provides funds or goods in a significant amount." Because this provision is written in the present tense and because the effective date of the statute was November 6, 2002, funds provided prior to that date would be excluded from consideration absent the "safe harbor" provision.

In addition, while the NRCC was prohibited from donating building fund moneys to another organization after November 6, 2002 (2USC 431(8)(B)(viii)[1], the financing analysis under 11 CFR 300.2(c)(2)(vii) would not change if the donation had been made after that date and all other relevant facts remained as they are. Funds which are received, maintained in a separate account, never accessed or used, and then returned to the donor within roughly 60 days (accord 11 CFR 103.3(b)(3)) at a time when the recipient organization is not raising other funds or conducting significant activities cannot be viewed as financing an organization.

This point is important because the complainants in this matter or other critics of the Commission may cite this case as "one that got away" due to the Commission's allegedly lax regulations. In fact, precisely the opposite is true: the Commission's "safe harbor" regulation had the effect of assuring that this transaction would be examined rather than ignored in our "financing" analysis and, in my view, the conclusion regarding "financing" would not have changed had the initial transfer of funds been made just after rather than just before the BCRA effective date.

The General Counsel's statement on the effect of the "safe harbor" rule applies more narrowly to press accounts suggesting that the NRCC may have played a role in establishing the Leadership Forum (FGCR at 12-13). The Counsel properly concludes that these accounts must be excluded from our analysis pursuant to 11 CFR 300.2(c)(3). While this safe harbor provision made the analysis easy, I am not persuaded that we should have reached a different conclusion in its absence. The "evidence" of an NRCC role in establishing the Leadership Forum is a single newspaper article quoting the then-Chairman of the NRCC as saying "We're having stuff set up right now" and which "connected" an individual who subsequently was an officer of the Forum (which did not exist at the time the article was published) to efforts by "House Republicans" to find ways to "legally raise soft money." The FGCR also cites apparent dual representation by an attorney in the form of an opinion letter to the NRCC on the proposed donation to the Leadership Forum.

Taking the latter factor first, nothing in our regulations at 300.2(c)(2) suggests that dual representation by an attorney is a factor for special scrutiny in our analysis of whether one organization is established, financed, maintained or controlled by another organization. While it is true that the list of specific factors is not exclusive, dual representation hardly leaps out as a critical missing link. Significant legal services provided on an ongoing basis might properly be analyzed under factor (vii) as indirect payments for administrative costs, but a single opinion letter hardly qualifies as significant or ongoing. Given subsequent developments it was certainly

[1] BCRA, PL 107-155, Sec. 103(b)

reasonable for the NRCC to have requested an opinion letter on this transaction, and given that the Leadership Forum was seeking significant funds from the NRCC, it was hardly unreasonable that the Forum bear responsibility for obtaining a legal opinion. Since the firm issuing the opinion is the firm which has and still represents the Forum, and since that firm does not appear to have a prior or continuing relationship with the NRCC, it appears that the Forum provided this legal service to the NRCC rather than the other way around. ("[T]he forum took specific steps to ensure that the contemplated donation would not surrender any authority...to the NRCC" followed by a quotation from the opinion letter, Leadership Forum Response at 6) This cannot constitute evidence that the NRCC "had an active or significant role in the formation of" the Forum. (300.2(c)(2)(ix))

While the Commission has considered news reports in making RTB determinations (that is, whether to open an investigation), we normally consider how specific and credible those reports are. We also consider other evidence in hand that may tend to undermine or refute press reports. Here the Leadership Forum is nowhere mentioned in the press report cited in the FGCR. The NRCC Chairman is quoted as "setting up stuff" and a person who subsequently became an officer of the forum is accused of attempting to explore legal options for House leaders. In contrast to these indefinite press accounts are the explicit denials by the NRCC and by the Forum and its officers that the NRCC had any role in establishing the forum, along with contemporaneous documents including the opinion letter and the Forum's articles of incorporation and bylaws, which included detailed and specific provisions prohibiting control by political party organizations.

In dismissing numerous other news reports submitted by the complainants (FGCR at 8) the counsel concluded that those reports were even less reliable, specific or significant than the one article cited in the FGCR, a assessment with which I agree. The one non-specific article cited in the FGCR (and indeed other speculative reports submitted with the complaint) fails to provide support for a finding of RTB by the Commission in the face of the specific and documented denials of the allegations by all parties involved, regardless of the exclusionary operation of 300.2(c)(3). (See Statement of Reasons in MUR 4960, Hillary Clinton et. al.)

Even assuming admissibility of the pre-November 6, 2002 reports, and differing with my assessment of their weight and meaning, the Commission might be left with "questions about the NRCC's role." (FGCR at 12) That is we might, at most, have had reason to investigate whether the NRCC played a significant role in establishing the Forum (an investigation which would be unnecessary and unjustified in light of the Commission's precedents) but not a legal conclusion that the NRCC had established the Forum.

Having concluded that the pre-November 6, 2002 reports are inadmissible, the FGCR might better have limited its discussion to that conclusion rather than recounting the essence of one report, thereby suggesting that there might have been some impropriety without even mentioning in its report the explicit and documented denials by accused persons and entities.

National Republican Congressional Committee

I supported the General Counsel's recommendation that we find reason to believe that the National Republican Congressional Committee (NRCC) violated 2 USC 441i(a) in receiving the refund of its donation to the Leadership Forum after November 6, 2002, but that we take no further action on the issue, as the most efficient way to conclude this matter. However, in my view the finding against the NRCC was unnecessary and arguably unjustified. The counsel's reading of the BCRA "receipt" prohibition as prohibiting the acceptance of a refund to a non-Federal account during the soft money transition period would prohibit the most routine and benign commercial activity, such as the acceptance of a refund for goods or services paid for but never delivered. I do not believe that such an inflexible reading of the BCRA is necessary or was intended by its sponsors. Nonetheless, the finding is insignificant not least because the circumstances are unlikely to be repeated.

Democratic State Parties Organization

I agree with the findings and analysis in the FGCR regarding the Democratic State Parties Organization (DSPO). During Commission discussion of the report one Commissioner raised concerns about whether the affiliation analysis in which the General Counsel concluded that the DSPO is affiliated with the Democratic National Committee was necessary to our findings inasmuch as the Counsel recommended "no reason to believe" because the DSPO apparently has neither received any funds nor conducted any activities. This concern is similar to the question I raise above about the propriety of presenting alleged evidence of affiliation between the NRCC and the Leadership forum after concluding that the information in question was necessarily excluded from our analysis by operation of our own regulations.

Because the Office of General Counsel cannot predict when beginning its examination of a complaint what bases will prove dispositive for its own recommendations or for the Commission, the question of affiliation (which was specifically alleged in the complaint) was appropriately reviewed as part of the Counsel's inquiry and analysis and was appropriately presented to Commission in the General Counsel's Report.

The next procedural question is whether the discussion and analysis of a question that ultimately proved not essential to our conclusion should be released to the public. We agree that there are substantial reasons for excluding non-essential discussions because, as in the case of the NRCC and the Leadership Forum, they can be prejudicial without purpose. However, the Commission's long standing and consistent practice has been to release the complete General Counsel's reports as presented to the Commission, and any revision of that practice should be considered on a generic and forward-looking basis, probably following an appellate decision after *AFL-CIO v. FEC*, 177 F.Supp.2d 48 (2001), which raises closely related issues, not as an ad hoc decision applied to this case only.

The Commissioner raised substantive questions about our affiliation conclusion as well arguing, among other things, that the Association of State Democratic Chairs (ASDC) may have severed ties with DNC earlier than now reported. (The FGCR discusses indications that the ASDC may have taken steps to sever ties with the DNC early in 2003, but well after the November 6, 2002 BCRA effective date, the 11 CFR 300.2(c)(3) safe harbor and the December 31, 2002 conclusion of the BCRA transition period.) Unfortunately, speculation that facts may be different from those reported to us by investigated entities themselves in official reports has no basis. If facts in this case or others are different than they initially appear, different results may ensue, but there is no reason to make such assumptions here. Just as we reject complaints based on speculation, we must avoid making conclusions based on our own speculation, especially when that speculation is contradicted by uncontroverted reports to us.

The Commissioner also alleged that the Counsel's analysis was based on a "novel transitive theory of affiliation." In fact, the counsel's affiliation analysis was anything but novel, based on an examination of formal ties between the organizations concerned, common membership and the existence of overlapping officers serving in apparently identical capacities, all factors specifically enumerated in our affiliation regulations. 11 CFR 110.5(g)(4)(ii); 110.3(a)(3). The counsel justifiably concluded that the DSPO appears to be an alter ego (a concept which does not qualify as a novel legal theory) of the ASDC, an organization that acknowledges affiliation with the DNC. If incorporated business entities had similar ties, there is no question that we would conclude they were affiliated for purposes of our regulations.

A question was also raised about whether the different conclusions as to the DSPO and the Leadership Forum might undermine the credibility of the report. As the FGCR points out, what associations now apparently exist between the NRCC and the Leadership Forum are informal (if any), whereas specific formal and structural links appear to exist among the DNC, ASDC and DSPO. An agency is surely justified in making a distinction between alleged informal links and documented formal relationships. Even so, it is worth noting that the FCGR does not let the Leadership Forum completely off the hook, noting that developing facts or future operational decisions could result in a different conclusion as to affiliation with Republican Party organizations. (footnote 25, page 19) Similarly, the report notes that if facts as to the DSPO are changed from those described in the report, different conclusions might ensue. (footnote 37, page 33)

My colleagues' statement (Statement of Reasons of Commissioner Thomas and Chair Weintraub in MUR 5338) criticizes the FGCR for citing statements made prior to November 6, 2002 in its affiliation analysis of the DSPO. However, as the FGCR points out, the analysis relies substantially on reports filed by the ASDC *after* November 6, 2002, and cites pre-November 6 statements to assess what appears to have been an unaltered relationship.

My colleagues' due process arguments are not without weight. Former Commissioner Wold raised the potential unfairness of releasing RTB findings without an opportunity for a response on the record in several instances. The question of respondent notification is complex.

For this reason the Commission issued Notice of Public Hearing and Request For Comment Regarding Enforcement Procedures on April 24, 2003, specifically seeking comment on respondent designation. I believe the important issues related to this question are best addressed in that forum. In this Matter, because the Commission is taking no action against these respondents, and because the committees involved can resolve remaining questions through the Advisory Opinion process, I am not persuaded that the due process concerns raised should prevent us from presenting a preliminary conclusion that the DSPO and DNC appear to be affiliated.

It is also critical to fundamental fairness to note that if we believe, based on the record before us, that these organizations are affiliated, we would do them no favor by suppressing that conclusion. Indeed, doing so would amount to a trap for the organizations that would be proceeding at their peril in the face of a significant but undisclosed legal conclusion by the government agency that regulates their activities.

I disagree with our colleagues' characterization of the FGCR as "requiring" the DSPO to seek an Advisory Opinion before proceeding with certain activities. The AO process simply (and helpfully) provides a way to obtain a binding opinion if desired. Of course, failing to seek an opinion would present risks, but those risks would be equally if not more present absent release of the FGCR, so the AO process is to the advantage of the ASDC. Furthermore, the Commission's affiliation regulations in one instance, that of relations between state and local party organizations, do presume affiliation and effectively require an advisory opinion to rebut that presumption. 11 CFR 110.3(b)(3). Thus, even if the practical effect of the FGCR is to make it difficult for the DSPO to proceed absent an Advisory Opinion, this would hardly be an unprecedented burden under the Commission's approach to affiliation.

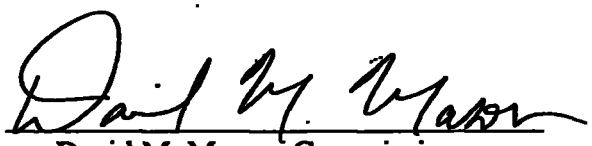
Looking to the future, it is at least possible that the DSPO may be able to disentangle itself from the DNC, should it wish to do so. Despite the ban on "soft money" fundraising by officers of a national party committee, the BCRA, in expressly allowing state party committees to maintain non-federal accounts, plainly contemplates that some officers of national party committees may, in their capacity as state party officials, raise non-federal funds. (BCRA's sponsors were obviously aware that the national party committees of both major party committees are composed overwhelmingly of state party chairmen and other officials or persons elected by state party committees.) As noted above, the Commission's pre-BCRA regulations addressed affiliation between state and local party organizations. BCRA itself addresses the status of associations of state officials and state candidates. BCRA also, in essence, presumes affiliation among national, state and local party committees for purposes of coordinated and independent expenditures. 2 USC § 441a(d)(4)(C). Thus, the status of associations of state parties and their relations to national parties for other purposes appear to be classic instances of gaps in a statute open to interpretation by an administrative agency such as the FEC.

The issues presented by associations of state parties are not simple. Since national parties are typically governed by committees composed overwhelmingly of state party chairs and other

officers elected by state parties, any national association of state parties (especially when governed by many of the same state party officials who are members of the national party committee) could appear to be controlled by the same group of persons as those controlling the national party. 11 CFR 100.5(g)(3)(v); 110.3(a)(2)(v). However, BCRA also permits these same state party officials to continue to raise non-Federal funds prohibited to national party committees and limits cooperation in fundraising efforts only as to Levin funds. 2 USC § 441i(b)(2)(C). Thus, state parties are permitted to engage in at least some cooperative efforts to engage in activities prohibited to national parties. On the other hand, given the composition of national party committees, how an organization of state parties operating nationally differs from the national party organization itself is unclear. The status of organizations composed of state parties or state party officials may be affected both by the activities of such organizations and by their exact organizational structure.

It is clear, however, that if an organization of state party officials accepts ongoing support such as office space from a national party, the state organization is affiliated with the national committee. Whether it is possible for an organization constituted similarly to the DSPO to be treated as separate from a national party organization with appropriate operational and structural arrangements remains to be determined. Based on the record facts as of the date of the complaint in this matter, and for some time afterward, the DSPO and DNC are affiliated.

April 28, 2003



David M. Mason, Commissioner